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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

WALTER COTO,

Defendant and Appellant.

D059432

(Super. Ct. No. JCF25385)

APPEAL from an order of the Superior Court of Imperial County, Christopher W. Yeager, Judge. Affirmed.

An indictment filed on May 14, 2010, charged Walter Coto and codefendant Mitchell Benavides, who was Coto's prison cellmate, with one count each of possessing marijuana in prison. (Pen. Code,¹ § 4573.6.) The indictment further alleged Coto had one prison prior (§ 667.5) and one prior strike conviction for a crime committed in state prison (§ 667 subds. (b)-(i); 1170.12, subds (a)-(d); 1170.1, subd. (c)).

¹ Statutory references are to the Penal Code unless otherwise stated.

On August 19, 2010, the court dismissed the indictment against Coto based on Benavides's plea of no contest to the charges. Coto unsuccessfully petitioned for a judicial finding of factual innocence under section 851.8.

Coto contends the trial court erroneously denied his petition because his mere presence in the prison cell was insufficient probable cause to charge him with marijuana possession in prison. We affirm.

BACKGROUND

Michael Taylor, a correctional officer, testified at the hearing on the petition that on December 31, 2008, he was on duty and searched the cell of Benavides and Coto, and found two pens containing marijuana cigarettes; one was on a shelf, and the other was on a table in the common area.

Miguel Sevilla, who is incarcerated for murder, testified that on December 31, 2008, he asked Benavides to hold the two pens for him, without telling Benavides they contained marijuana. Coto was not in the cell, and did not know anything about the marijuana cigarettes in the pens.

Coto testified he was not in the cell when the marijuana was taken there. Although he generally used the desk in the cell, he never saw the pens. Coto testified he never used drugs at any time, either before or after he was in prison. Coto was found innocent of the charge of marijuana possession at his "115 hearing."²

² When an inmate commits misconduct that "is believed to be a violation of law, or is not minor in nature," it is reported on a "Form 115." (Cal. Code Regs., tit. 15, § 3312.)

The parties stipulated that if called to testify, Benavides would have testified that the pens belonged to him, and Coto knew nothing about them. The People represented in court filings that at Benavides's 115 hearing, he was found to have possessed the two pens.

In denying Coto's ensuing section 851.8 petition, the court stated, "I find that with a—a two-man prison cell, and one of [the] pens—at least according to correctional officer Taylor's testimony— was found in the common area, that there was reasonable cause for the grand jury to return their indictment. [¶] I can certainly understand why the prosecutor chose to dismiss, and particularly when they got an admission from one of the parties, but that—it just simply doesn't meet [the section 851.8 standard.]"

DISCUSSION

A defendant who is arrested and indicted, but not convicted, "may, at any time after dismissal of the action, petition the court that dismissed the action for a finding that the defendant is factually innocent of the charges for which the arrest was made."

(§ 851.8, subd. (c).) The defendant bears the initial burden of proving "that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made." (*Id.* subd. (b).) "The arrestee thus must establish that facts exist which would lead no person of ordinary care and prudence to believe or conscientiously entertain any honest and strong suspicion that the person arrested is guilty of the crimes charged.

[Citation.] [¶] Establishing factual innocence . . . entails establishing as a prima facie matter not necessarily just that the arrestee had a viable substantive defense to the crime charged, but more fundamentally that there was no reasonable cause to arrest him in the

first place." (*People v. Matthews* (1992) 7 Cal.App.4th 1052, 1056.) If the defendant makes the requisite showing, the burden shifts to the People to prove "that a reasonable cause exists to believe that the petitioner committed the offense" (§ 851.8, subd. (b).)

"A finding of factual innocence . . . shall not be made unless the court finds that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made." (§ 851.8, subd. (b).) "In other words, the trial court cannot grant relief if *any* reasonable cause warrants such a belief." (*People v. Adair* (2003) 29 Cal.4th 895, 904.) "In sum, the record must exonerate, not merely raise a substantial question as to guilt." (*Id.* at p. 909.)

The appellate court defers to the trial court's factual findings supported by substantial evidence (*People v. Adair, supra*, 29 Cal.4th at pp. 897, 905-906), but independently reviews the record to determine whether "no person of ordinary care and prudence [would] believe or conscientiously entertain any honest and strong suspicion that the [defendant] is guilty of the crimes charged." (*Id.* at p. 907, quoting *People v. Matthews, supra*, 7 Cal.App.4th at p. 1056.)

Section 4573.6 states: "Any person who knowingly has in his or her possession in any state prison . . . any controlled substances, the possession of which is prohibited by Division 10 (commencing with Section 11000) of the Health and Safety Code, any device, contrivance, instrument, or paraphernalia intended to be used for unlawfully . . . consuming controlled substances, without being authorized to so possess the same . . . is guilty of a felony" As stated in *People v. Palaschak* (1995) 9 Cal.4th 1236, the

essential elements of the offense of possession of a controlled substance are dominion and control of the substance in a quantity usable for consumption or sale, with knowledge of its presence and of its restricted dangerous drug character. These elements may be established by circumstantial evidence. (*Id.* at p. 1242.) "Actual or constructive possession is the right to exercise dominion and control over the contraband or the right to exercise dominion and control over the place where it is found. [Citation.] Exclusive possession is not necessary. A defendant does not avoid conviction if his right to exercise dominion and control over the place where the contraband was located is shared with others." (*People v. Rushing* (1989) 209 Cal.App.3d 618, 622.)

The evidence shows the pens containing marijuana cigarettes were found in the confined space of a relatively small prison cell, and one pen was found on a table over which both Coto and Benavides exercised possession. Therefore, we conclude sufficient probable cause existed to arrest Coto. Concededly, in light of testimony that Coto did not know about the pens and that Benavides admitted at his 115 hearing that the pens were his, significant doubt was raised about Coto's guilt. But those doubts do not rise to the level of exoneration. Therefore, the court did not err in denying the petition for a finding of factual innocence.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

McDONALD, J.